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No. 79-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

IOWA ELECTRIC LIGHT AND POWER COMPANY,
Petitioner,

v.

ATLAS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Iowa Electric Light and Power Company requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 603 F.2d 1301, appears at Appendix A to this petition. That opinion reversed and remanded a decision of the District Court, reported at 467 F.Supp. 129, which appears at Appendix B. The reported decision

of the District Court, in concluding that the court had jurisdiction of the parties to the suit, reiterated an earlier unreported District Court decision overruling the respondent Atlas Corporation's motion to dismiss for lack of personal jurisdiction. The unreported order, dated April 7, 1977, appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals, which was entered on August 22, 1979, appears at Appendix D. Mr. Justice Blackmun extended the time for filing this petition for certiorari to and including December 19, 1979, by order entered November 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a federal district court in Iowa may constitutionally exercise personal jurisdiction over a Delaware corporation with its principal place of business in New Jersey and formerly in New York, in an action brought by an Iowa utility for breach of a supply contract, where the defendant corporation voluntarily elected to contract with the Iowa utility, where the defendant corporation knew both that the goods to be supplied were ultimately destined for use by the utility in Iowa and that the economic impact of its breach would be directly felt in Iowa, and where the defendant corporation was not unreasonably inconvenienced or otherwise prejudiced by being subjected to the jurisdiction of the Iowa court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Iowa Code § 617.3, as amended, provides, in relevant part:

> If a foreign corporation makes a contract with a resident of Iowa to be performed in whole or in part by either party in Iowa, . . . such acts shall be deemed to be doing business in Iowa by such foreign corporation for the purpose of service of process or original notice on such foreign corporation under this section, and, if the corporation does not have a registered agent or agents in the state of Iowa, shall be deemed to constitute the appointment of the secretary of state of the state of Iowa to be its true and lawful attorney upon whom may be served all lawful process or original notice in actions or proceedings arising from or growing out of such contract. . . .

STATEMENT OF THE CASE

A. The Contract

Petitioner Iowa Electric Light and Power Company ("Iowa Electric"), an Iowa corporation with its principal place of business in Cedar Rapids, Iowa, operates a nuclear power facility known as the Duane Arnold Energy Center near Palo, Iowa, providing electricity to residents of a significant portion of Iowa. Respondent Atlas Corporation ("Atlas"), which is a Delaware corporation with its principal place of business now

in New Jersey and formerly in New York, is engaged in supplying uranium nationwide to operators of nuclear generating facilities, including Iowa Electric. From the time of the Duane Arnold Energy Center's construction until early 1978, Atlas was the sole supplier of uranium to that facility under not only the contract involved in this case but also an earlier contract executed in 1971, by which Atlas provided Iowa Electric with 871,000 pounds of uranium in 1972 and 1974.

In August 1972, Iowa Electric wrote to a number of uranium producers seeking bids on a contract to supply the uranium requirements of the Duane Arnold Energy Center for the years 1975 to 1978. Atlas was one of several suppliers who elected to do business with Iowa Electric by bidding on the contract. After negotiations over price, delivery and other contractual terms, Atlas' bid was accepted and the contract was formally executed by Iowa Electric in Cedar Rapids, Iowa, and by Atlas in New York in October of 1973. Among other things, the contract expressly provided that Iowa law should govern interpretation of the agreement.

Under the contract, Atlas agreed to provide Iowa Electric with uranium concentrates (U_3O_8), commonly called "yellow cake," for the period from 1975 to 1978. Since "yellow cake" is not suitable for use as nuclear fuel without further processing, the contract provided for delivery by Atlas to testing and processing facilities outside Iowa designated by Iowa Electric.[1] Atlas

[1] The contract provided for delivery of the "yellow cake" by Atlas first to a testing facility in Illinois, and thereafter, if satisfactory, to an Allied Chemical Corporation processing plant, also in Illinois. After commingling with other ores and conversion to a gaseous state at Allied's plant, the "yellow cake" and other components in the form of gaseous UF_6 are shipped to what are now United States Department of Energy facilities for enrichment with U-235 isotopes. Finally, the enriched UF_6 gas comprised of the elements of the "yellow cake" and other constituent materials are converted back to a solid (UO_2) at a General Electric Company plant in North Carolina and this solid is assembled into fuel bundles that are used in Iowa Electric's Duane Arnold Energy Center in Palo, Iowa. Pet. App. 8a-9a.

was well aware, however, that the processed material, of which the "yellow cake" it supplied was the crucial component, was destined for use in Iowa as fuel for the Duane Arnold Energy Center.[2] Indeed, Atlas knew that Iowa Electric was heavily dependent on the uranium concentrates to be supplied under the contract, since that contract was intended to meet all of Iowa Electric's concentrates requirements for the Duane Arnold Energy Center during the life of the contract.

B. The Dispute

Over the life of the contract, the market price of uranium increased substantially, and Atlas sought to renegotiate the contract price with Iowa Electric. In 1976, Iowa Electric did renegotiate the contract and agree to a price increase. Nonetheless, Atlas subsequently delayed deliveries of "yellow cake" under the contract in an effort to win a further price increase, well aware of the potential consequences of such action for Iowa Electric and its thousands of customers within the State of Iowa.[3]

[2] As Atlas knew, the Duane Arnold Energy Center is in fact the only nuclear power facility operated by Iowa Electric.

[3] In the event of non-delivery by Atlas, Iowa Electric in essence had the choice of either attempting to purchase the necessary uranium concentrates on the open market and attempting to re-

In response to this action by Atlas, Iowa Electric instituted this suit on March 22, 1977, in the United States District Court for the Northern District of Iowa, invoking the court's diversity jurisdiction. In its complaint, Iowa Electric sought specific performance of the contract through preliminary and permanent injunctions. Jurisdiction over Atlas was obtained under the Iowa long-arm statute.[4]

C. The Decisions Below

Atlas moved to dismiss the complaint for lack of personal jurisdiction. The District Court denied Atlas' motion on April 7, 1977. Pet. App. 1c. In its decision on the motion, the District Court concluded that the contract had "substantial connection" with Iowa, that the defendant had "purposely availed itself of the protection of Iowa law," and that Iowa had "a strong interest in providing a forum for fuel supply contract disputes affecting a major energy source." Pet. App. 1c-2c.

Subsequently, on April 11, 1977, Atlas filed a counterclaim, alleging commercial impracticability to excuse its non-performance and seeking an equitable adjustment of the contract price.[5] In a decision rendered

cover the increased costs from Atlas or else doing without the uranium concentrates and the energy to be derived from those concentrates. Regardless of which choice Iowa Electric made, the result for its customers would have been higher electricity bills.

[4] Iowa Code § 617.3.

[5] At a hearing on a preliminary injunction later in April 1977, the parties stipulated that Atlas would continue to supply uranium under the contract, reserving its right to any price adjustment determined by the court after trial of the merits of the counterclaim (Pet. App. 4b).

on May 4, 1978, supplemented by a further decision dated September 8, 1978, the District Court concluded that Atlas' counterclaim should be dismissed, and entered judgment for Iowa Electric. Pet. App. 16b, 23b.

On appeal from the District Court's decision, the Eighth Circuit found it unnecessary to reach the merits of the case. In an opinion dated August 22, 1979, the Court of Appeals concluded that the lower court had erred in exercising jurisdiction over Atlas. The Eighth Circuit did not deny that the Iowa long-arm statute had been properly invoked in this case (Pet. App. 3a-4a); nor did it even suggest that Atlas had been inconvenienced or otherwise prejudiced by being called upon to defend its breach in Iowa. Instead, the Court of Appeals concluded that Atlas lacked "sufficient minimum contacts with the State of Iowa" to permit, as a constitutional matter, assertion of jurisdiction over Atlas' person in Iowa. Pet. App. 10a. The court reached this conclusion despite the fact that Atlas had voluntarily chosen to contract to provide the uranium concentrates required for use in Iowa Electric's Palo, Iowa, generating facility and was fully aware of the serious impact that its breach would have on Iowa Electric and its customers throughout Iowa.

In light of its determination, the Court of Appeals reversed the lower court's decision and remanded with directions to enter judgment of dismissal in favor of Atlas. Pet. App. 10a. Petitioner now seeks review of the Eighth Circuit's decision on the jurisdictional issue in this case.[6]

[6] Following the Court of Appeals' decision, Atlas moved for restitution in the District Court, claiming that Iowa Electric should be required to restore an amount of uranium equal to the

REASONS FOR GRANTING THE WRIT

At issue in this case is whether a foreign supplier, who has voluntarily contracted to supply certain goods to another, may constitutionally be subjected to suit for breach of the contract in the forum in which he knows or can readily forsee the goods are destined to be used, and in which the full economic consequences of his breach will be felt. The court below has ruled in substance that such contacts with the forum state provide an insufficient basis for the exercise of personal jurisdiction, but this ruling conflicts with both decisions of this Court, and decisions of the Fifth and Tenth Circuits. What is more, the issue presented by the decision below is, as a practical matter, an extremely important one whose resolution may have substantial consequences for large numbers of commercial transactions; indeed, the importance of the issue presented is clearly demonstrated by a closely related case now pending before this Court, *World Wide Volkswagen Corp.* v. *Woodson, cert. granted,* 47 U.S.L.W. 3543 (U.S. No. 78-1078, February 21, 1979).

I.

The Decision Below Erroneously Applies the Standards Set Forth by This Court in *International Shoe* and its Progeny.

As this Court established in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and most recently reaffirmed in *Kulko* v. *Superior Court of California,* 436 U.S. 84 (1978), the constitutional standard governing jurisdiction over the person of a defendant depends

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amount delivered by Atlas on the ground that the uranium had been delivered pursuant to a District Court order rendered invalid by the Court of Appeals' decision. This motion, which Iowa Electric believes to be without foundation, is still pending before the District Court.

on the existence of "minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 92, quoting from *International Shoe, supra,* 326 U.S. at 316. To aid in the application of this standard, the Court has evolved, in a series of cases beginning with *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958), a further guiding principle: a plaintiff may not, for constitutional purposes, justify its resort to a particular forum on the basis of its own unilateral activity within the jurisdictional boundaries of the forum; rather, the Court has said, the defendant must "purposefully avail[ ] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* See also *Shaffer* v. *Heitner,* 433 U.S. 186, 216 (1977); *Kulko* v. *Superior Court of California, supra,* 436 U.S. at 94.

The crux of the decision below was that Atlas had not engaged in any conduct which satisfies this Court's "purposefully availing" test for purposes of the present case, and thus there was no basis for the exercise of jurisdiction over Atlas' person by the Iowa court. Pet. App. 4a. The Court of Appeals reached this mistaken conclusion largely by focusing on only one aspect of Atlas' conduct, namely, its initial delivery of the uranium concentrates supplied under the contract to an Illinois processer acting for Iowa Electric. Pet. App. 8a-10a. Had the court examined the full panoply of Atlas' activities establishing its contacts with Iowa, it would have found that a conclusion very different from the one it reached is in fact warranted here.

Petitioner Iowa Electric's claim against Atlas is predicated on the existence of a long-term contract between the parties, for the supply of uranium concen-

trates known by Atlas to be destined for use in Iowa, and indeed to be critical to the operation of petitioner's Iowa nuclear generating facility. Atlas was under no compulsion to do business with petitioner; it voluntarily responded to petitioner's solicitation of bids and sought to secure for itself what it obviously perceived at the time to be the commercial advantages of contracting to supply Iowa Electric's uranium concentrates requirements with respect to its Palo, Iowa generating facility. And Atlas certainly knew that any breach of its contract would have a serious impact not only on the petitioner in Iowa but on the economy of Iowa itself (see p. 5n. 3, above).

When the case is viewed in this light, it is apparent that there were very substantial "contacts" between Atlas' conduct and the forum jurisdiction—Iowa—that made it both "reasonable" and "fair" to require Atlas to conduct its defense there.[7] *Kulko, supra,* 436 U.S. at 92, quoting from *International Shoe, supra,* 326 U.S. at 316-17. See also *Shaffer* v. *Heitner, supra,* 433 U.S. at 207-12. In addition, Atlas' conduct establishes that it has "purposefully avail[ed] itself of the privilege" of participating in commercial opportunities associated with Iowa. *Kulko, supra,* 436 U.S. at 101. If there is any doubt that such action provides a sufficient basis

[7] As noted (p. 7, above), the Court of Appeals made no suggestion that it was inconvenient to try this case in Iowa or that Atlas was otherwise prejudiced by the locus of the case. Nor could the court reasonably have so suggested. What is more, the contract specified that Iowa law was to govern its interpretation (p. 4, above). In these circumstances, an Iowa forum was an entirely fair and sensible site for trial of this case; indeed, as the District Court noted, "defendant [did] not claim to be inconvenienced by [the Iowa] forum" (Pet. App. 2c).

for the Iowa court's exercise of personal jurisdiction over Atlas, it is dispelled by this Court's recent decision in *Kulko.*

In *Kulko,* the Court determined that the defendant, a New York resident, was not subject to the jurisdiction of a California Court in a suit concerning his responsibility for the support of his children, where the defendant's sole "act" had been to permit his daughter, at her request, to move from his home in New York to the home of his divorced wife in California. 436 U.S. at 97. In finding that under these circumstances the defendant had not availed himself of the benefit and protection of California's laws, the Court emphasized that the defendant had not demonstrated any "intent to obtain or expectancy of receiving a . . . benefit in the [forum] State that would make fair the assertion of that State's judicial jurisdiction." *Id.* at 101.

What is more, the Court in *Kulko* distinguished its prior decision in *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957), a case very similar to the present one, on essentially the same ground. In *McGee,* the defendant's sole act directed at the forum state was the mailing of a contract of reinsurance into the state for signature by the plaintiff, a state resident. The insured mailed premiums to the defendant from the state until his death. These minimum contacts with the forum state were found sufficient to support personal jurisdiction in a suit to enforce the contract—although the defendant never did any other business within the state—again because of the defendant's manifested intent to benefit commercially from his contacts with a resident of the forum. Cf. *Kulko* v. *Superior Court of California, supra,* 436 U.S. at 97.

Judged by the standard reflected in *Kulko* and *McGee,* Atlas has more than satisfied the "purposefully availing" requirement for present purposes. Atlas has benefited in the past from its contacts with the petitioner which is a resident of Iowa; and it voluntarily entered into the contract now in dispute seeking to derive further benefit from petitioner's need for uranium concentrates for use in the fuel bundles for its Iowa generating facility.[8] By such conduct, Atlas has, without question, displayed the requisite intent to benefit from its contacts with Iowa, and thus the Iowa trial court's assertion of jurisdiction over Atlas was entirely fair and reasonable.

In *Kulko,* to be sure, the requirement that the defendant "purposefully avail" himself of the privilege of conducting activities in the forum was also linked by the Court to whether the defendant might reasonably have anticipated being "haled before a [California] court," 436 U.S. at 98.[9] Jurisdiction was denied in *Kulko* in part because the plaintiff's efforts to bring her non-resident husband before a California court depended wholly upon the fortuitous circumstance of her having taken up residence in California following their separation in New York. See *id.* at 97. In this case, however, there was nothing fortuitous about the choice of an Iowa forum: petitioner owes its existence

[8] Moreover, the mail contacts between the insurer and insured in *McGee, supra,* 355 U.S. at 221-22, are matched here by the invoices sent into Iowa by respondent, the payments sent by petitioner from Iowa to respondent, and the requirement that respondent send certain forms of notification to petitioner in Iowa.

[9] Quoting from *Shaffer* v. *Heitner, supra,* 433 U.S. at 216, where the Court placed similar emphasis on the reasonable expectations of the defendants.

to Iowa law and has always been located in Iowa; respondent voluntarily entered into two consecutive contracts to provide petitioner with uranium concentrates known by it to be destined for use in Iowa; and the effect of respondent's breach would be felt within Iowa as respondent knew full well.

In short, the Court of Appeals has seriously misapplied in the present case this Court's line of decisions beginning with *International Shoe Co.* v. *Washington, supra.* As a result, the court below "has decided a federal question in a way" that fundamentally conflicts "with applicable decisions of this court." Cf. Sup. Ct. Rule 19(1)(b). Certiorari is, therefore, warranted.

II.

The Decision Below Conflicts with Decisions of Both the Fifth and the Tenth Circuits.

Section 37 of the American Law Institute's Restatement (Second) of Conflict of Laws (1971) specifically provides that:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable."

This provision reaches not only tortious activity which causes injury within the state but also commercial activity which has injurious effects within the state.[10]

[10] See ALI Restatement (Second) of Conflict of Laws, comment a, at 157 (1971). The Court recognized this fact in *Kulko, supra,* 436 U.S. at 96, although it found Section 37 inapplicable to

Thus, Section 37, as applied to this case, clearly encompasses the cause and effect relationship between respondent's gainful commercial activities and the impact of such activity within the State of Iowa—just as it also clearly encompasses the cause and effect relationship that existed, and rendered the assertion of jurisdiction wholly reasonable, in *McGee* v. *International Life Insurance Co., supra.* Cf. *Kulko, supra,* 436 U.S. at 97,

Section 37 of the Restatement obviously reflects a very different understanding of constitutionally permissible limits of personal jurisdiction than does the decision below.[11] To be sure, Section 37, however persuasive as a product of extensive legal scholarship, is not binding on federal courts. But two separate federal courts of appeals, in circumstances closely analogous to those presented here, have adopted essentially the same view of personal jurisdiction as is expressed in Section 37 and have rendered decisions sharply at odds with the ruling below in this case.

In *Product Promotions, Inc.* v. *Cousteau,* 495 F.2d 483 (1974), a contract action brought by a Texas resident against a foreign corporation in federal district court in Texas, the Fifth Circuit sustained the district court's exercise of jurisdiction over the defendant even though the defendant had "performed no physical act

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that case, since the defendant there had not caused an "effect" within California by purposefully benefiting "from any activities relating to the State of California." *Id.*

[11] Section 37, of course, embodies constitutional as well as common law considerations with respect to the proper scope of personal jurisdiction. See generally ALI Restatement (Second) of Conflict of Laws, comments to § 37, at 156-59 (1971).

of any sort" within the forum.[12] *Id.* at 495. The defendant's sole contacts with Texas consisted of making certain mailings to Dallas from abroad, principally of reports and film it had contracted to provide the plaintiff Texas corporation.[13] *Id.* Relying on this Court's decision in *McGee,* the Fifth Circuit observed that mail contacts alone "can be sufficient" for jurisdiction, and further that:

> "... even if the defendant performs no physical act within the State, activities outside the State can provide adequate contacts if they have reasonably foreseeable consequences within the State." *Id.* at 496 & n.22.

As for the requirement that the defendant's contacts support an inference of a purposeful decision to avail itself of the privilege of conducting business with the forum state, the Fifth Circuit stressed that the operative consideration must be whether

> "... *the defendant's contacts with the forum were deliberate, rather than fortuitous,* so that

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[12] The Texas long-arm statute, Tex. Rev. Civ. Stat. art. 2031b (4) (1964), invoked in *Cousteau* provides, in language almost identical to the Iowa statute employed here, that:

> "any foreign corporation ... shall be deemed doing business in this State by entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State ...."

[13] The Court of Appeals also purported to find that Texas was "the place of the contract" because *the plaintiff* had mailed a letter from Dallas accepting an offer previously made by defendant's representative in Europe. 495 F.2d at 495. However, such acceptance by the plaintiff involved no more action in Texas by *the defendant* in *Cousteau* than did Atlas' execution of the contract in this case in New York involve any action in Iowa by Atlas. In all events, in this case—as in *Cousteau—the plaintiff* executed the contract in the forum state. See p. 4, above.

> the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise." *Id.* at 496 (emphasis added).[14]

Observing that it was not unreasonable for defendant to foresee that its contractual obligations might be tested in Texas, and that enforcement and protection of its own contractual rights might depend on Texas law, the Court of Appeals concluded that the defendant had in fact submitted itself to Texas jurisdiction by

> ". . . voluntarily enter[ing] a transaction with one it knew to be a Texas resident, a transaction which had a substantial connection with Texas and which [defendant] had reason to know could have consequences in Texas." *Id.* at 497.

Precisely the same can be said in this case. Respondent voluntarily contracted with an Iowa resident; the transaction at issue in this case had a substantial connection with Iowa;[15] and respondent certainly had good reason to know that non-performance of its contractual obligation would have severe consequences in Iowa. Accordingly, no less than in *Cousteau,* there is a constitutionally sufficient basis in this case for the exercise of personal jurisdiction over the defendant.

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[14] On this basis, the Court of Appeals distinguished this Court's prior decision in *Hanson* v. *Denckla,* 357 U.S. 235 (1958), pointing out that in *Hanson* "the contacts with [the forum state] when viewed from the defendant's perspective, were completely fortuitous," 495 F.2d at 496 n.23. Here, the respondent's contacts with Iowa clearly were not fortuitous. See pp. 12-13, above.

[15] Not only was the material to be supplied by respondent destined for use in Iowa but respondent sent invoices to petitioner in Iowa and petitioner sent payments to respondent from Iowa. See p. 12 n. 8, above.

In *Pedi Bares, Inc.* v. *P & C Food Markets, Inc.,* 567 F.2d 933 (1977), the Tenth Circuit similarly determined that a defendant in a contract action who has caused reasonably foreseeable consequences within the forum may constitutionally be held subject to the jurisdiction of the forum's courts. The Kansas plaintiff in *Pedi Bares* had approached the foreign defendant, seeking to supply footwear to retail stores serviced by defendant, all located outside of Kansas. Using a letter of introduction supplied by defendant, plaintiff's agent solicited business from the retail stores and the resulting orders were filled by deliveries directly from plaintiff to the stores. Defendant's only contact with Kansas was to send to plaintiff in Kansas part payment for the goods delivered to the retail stores.

When defendant failed to pay for all the goods delivered, plaintiff brought suit in federal district court in Kansas, obtaining jurisdiction over defendant by means of a Kansas long-arm statute almost identical to the Iowa statute invoked in this case.[16] In rejecting the defendant's constitutional objection to jurisdiction, the Tenth Circuit essentially concurred in the Fifth Circuit's view in *Cousteau* that "[d]ue process does not require the presence in the forum state of the defendant or one of its agents." 567 F.2d at 937.

Although—as in the present case—"the initial solicitation" of business in *Pedi Bares* was made by plaintiff rather than by defendant, the court held that de-

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[16] 4A K.S.A. § 60-308(b)(5) provides that one who:

> "[e]nter[s] into an express or implied contract, by mail or otherwise, with a resident of this state, to be performed in whole or in part by either party in this state; . . ."

submits himself to the jurisdiction of the courts of the state "as to any cause of action arising from the doing of any of said acts."

fendant's subsequent action of providing a letter of introduction to plaintiff's agent "show[ed] that it purposefully availed itself of the privilege of carrying on activities to secure goods from a Kansas manufacturer and seller." *Id.* And since the consequences of the defendant's actions were "reasonably foreseeable," the Kansas court's exercise of jurisdiction over the foreign defendant was deemed to be constitutionally permissible. *Id.*

A parity of reason compels the conclusion that the Iowa trial court in this case had jurisdiction over respondent, for—like the defendant in *Pedi Bares*—respondent voluntarily and purposefully availed itself of the privilege of doing business with a resident of the forum state, producing readily foreseeable consequences within that state when it failed to perform as agreed.[17] The court below, however, reached a contrary conclusion. Its decision, which reflects serious error (see pp. 8-13, above), directly conflicts with the Tenth Circuit's decision in *Pedi Bares* as well as with the Fifth Circuit's decision in *Cousteau*.[18] Such a conflict

[17] Indeed, the basis for the exercise of jurisdiction is considerably stronger in this case than in *Pedi Bares*. There was no substantial history of dealings between the Kansas plaintiff and the foreign defendant in *Pedi Bares*, and while the retail stores' orders had been accepted by the plaintiff in Kansas and the goods required to fill the orders had been manufactured by the plaintiff in Kansas, *the defendant's* only contact with Kansas was the mailing of partial payment to the plaintiff there (see p. 17, above). In this case—as in *Pedi Bares*—the plaintiff formally entered into the relevant agreement within the forum state (see p. 4, above), and the contacts between Atlas and both Iowa Electric and the State of Iowa were much more extensive here than the comparable contacts in *Pedi Bares*. See pp. 9-10 & p. 12 & n. 8, above.

[18] See also, *e.g.*, *Kornfuehrer* v. *Philadelphia Bindery, Inc.*, 240 F. Supp. 157 (D. Minn. 1965). The lower court's decision also conflicts with numerous decisions holding that foreseeable tortious injury within the forum, resulting from conduct outside the forum, may be a constitutionally sufficient basis for jurisdiction. See, *e.g.*, *King* v. *Hailey Chevrolet*, 462 F.2d 63 (6th Cir. 1972); *Duple Motor Bodies, Ltd.* v. *Hollingsworth*, 417 F.2d 231 (9th Cir. 1969); *Aftanase* v. *Economy Baler Company*, 343 F.2d 187 (8th Cir. 1965); *J. Henrijean & Sons* v. *M. V. Bulk Enterprise*, 311 F. Supp. 417 (W.D. Mich 1970).

among circuit courts of appeals presents the clearest possible base for certiorari,[19] and consequently review by this Court should be granted.

III.

The Decision Below Raises an Important Question Regarding the Limits of Due Process That Should Be Decided by This Court.

The divergence of the decision below from the prior rulings of both this Court and other circuit courts is not the only reason that certiorari is warranted in this case. The Court of Appeals' ruling also presents a constitutional issue of considerable practical importance that requires resolution by this Court. Cf. Sup. Ct. Rule 19(1)(b).

As this Court has previously recognized, "[t]oday many commercial transactions touch two or more States and may involve parties separated by the full continent." *McGee* v. *International Life Insurance Co.*, *supra*, 355 U.S. at 222-23.[20] Thousands of suppliers

[19] Cf., *e.g.*, *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 473 (1973); *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 324 (1974).

[20] In *McGee*, the Court also observed that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 355 U.S. at 223. This point certainly applies in the present case where respondent made no claim that it was unduly inconvenienced by being required to defend this action in Iowa. See p. 10 n. 7, above.

and manufacturers regularly seek out business with consumers, distributors and other buyers located in different states than themselves, and place into the stream of commerce goods which they know are ultimately destined for use by these buyers in other jurisdictions. The Court of Appeals' decision in this case, if allowed to stand, could significantly limit the ability of the parties to such transactions to enforce their rights under agreements with foreign suppliers or buyers, and could even dissuade some individuals and firms—especially smaller ones—from doing business with suppliers or buyers located in other jurisdictions whenever they have a choice. Such serious potential consequences are, without more, sufficient to demonstrate the importance of the issue decided below and the need for review by this Court.

However, further indication of the significance of the question presented here is to be found in this Court's grant of certiorari in *World Wide Volkswagen Corp.* v. *Woodson,* 47 U.S.L.W. 3543 (U.S. No. 78-1078, February 21, 1979). In that case, the Oklahoma supreme court sustained a lower state court's decision that jurisdiction over two defendant foreign corporations, wholesale and retail automobile distributors, could constitutionally be based on injuries suffered by foreign plaintiffs while travelling through Oklahoma in an automobile purchased from the defendants in New York. *World Wide Volkswagen* is, of course, concerned with a tortious injury rather than a contractual default and its consequences, but the case involves an issue closely related to that presented in this case, namely, under what circumstances in-state consequences of out-of-state activity afford a constitutionally adequate basis for the exercise of jurisdiction over a foreign defendant.

In fact, if the Court affirms the lower court decision in *World Wide Volkswagen,* it would almost certainly be appropriate for the Court to grant certiorari and summarily reverse the decision below, since the defendant in this case had close, purposeful contacts with the forum state that are wholly lacking in *World Wide Volkswagen.*[21] At the very least, this case should be remanded to the Court of Appeals for further consideration in the event that *World Wide Volkswagen* is affirmed.

If, however, the Court should reverse *World Wide Volkswagen,* there would then be a strong need for plenary review of this case by the Court. In contrast to the situation in *World Wide Volkswagen,* this is not a case in which the effects of the defendant's conduct were felt in the forum state simply by happenstance; there is—as already seen (pp. 12-13, above)—no fortuity whatsoever involved in the relationship between Atlas and its conduct, on the one hand, and the Iowa forum, on the other.

Consequently, if *World Wide Volkswagen* is reversed, certiorari would be warranted in this case to draw a clear line for jurisdictional purposes between voluntary acts which are known or can reasonably be anticipated to have significant consequences within the

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[21] The defendant automobile distributors in *World Wide Volkswagen* are located in New York, and their sales are restricted to the Northeastern portion of the United States. See Petition for Certiorari, *World Wide Volkswagen Corp.* v. *Woodson,* (U.S. No. 78-1008), at 3 (filed Jan. 5, 1979). They have had no contact whatsoever with Oklahoma except that a car sold by them to the plaintiffs happened to be involved in an accident with another vehicle while being driven through Oklahoma. Of course, the contacts between respondent and the forum in this case are not the product of such mere fortuity. See pp. 12-13, above.

forum state and acts which cannot reasonably be anticipated to have such consequences. As the Fifth and Tenth Circuits have expressly found and as is also implicit in the prior decisions of this Court, acts falling into the former category afford a wholly appropriate basis for concluding that a defendant has purposefully availed itself of the benefit of acting within the forum and may, therefore, constitutionally be held subject to the jurisdiction of the forum's courts. Thus, this case presents an issue of "obvious importance" that requires authoritative resolution by this Court.[22]

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review unless the Court affirms in *World Wide Volkswagen Corp.* v. *Woodson,* (U.S. No. 78-1078), in which event certiorari should be granted and the decision below summarily reversed.

Respectfully submitted,

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December 1979

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[22] Cf. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 383 (1974).

APPENDIX A

APPENDIX A

IOWA ELECTRIC LIGHT AND POWER COMPANY, *Appellee*,

v.

ATLAS CORPORATION, *Appellant*.

No. 78-1759.

United States Court of Appeals,
Eighth Circuit.

Submitted March 12, 1979.

Decided Aug. 22, 1979.

* * * * * * * * * * *

Michael Corrigan, of Simpson, Thacher & Bartlett, New York City (argued), Eric N. Vitaliano, George M. Newcombe, Wesley N. Fach, Jr., Kristine Hamann, New York City, and Thomas M. Collins and Gary J. Streit, Shuttleworth & Ingersoll, Cedar Rapids, Iowa, on brief, for appellant.

Keith E. Stapleton, Silliman, Gray & Stapleton, Cedar Rapids, Iowa (argued), William O. Gray, John F. Gaston, Thomas J. Pitner, Cedar Rapids, Iowa, and Robert Lowenstein, Joel S. Wight and William J. Franklin, Washington, D. C., on brief, for appellee.

Before LAY, Ross, and MCMILLIAN, Circuit Judges.

Ross, Circuit Judge.

Plaintiff, Iowa Electric Light and Power Company (Iowa Electric), an electric utility in Cedar Rapids, Iowa, filed this lawsuit in the Northern District of Iowa,[1] seeking injunctive relief and specific performance of a contract under which defendant Atlas Corporation (Atlas) was to supply plaintiff with uranium ore concentrates, i. e., ura-

[1] The Honorable Edward J. McManus, Chief Judge, presiding.

nium "yellowcake." Atlas submitted a counterclaim for equitable price adjustment after contesting the court's jurisdiction over its person under the Iowa long-arm statute, Iowa Code § 617.3. We hold that the district court erred in overruling the motion to dismiss for lack of personal jurisdiction over Atlas, and we therefore reverse and remand.

I.

Atlas, incorporated in Delaware, has maintained its principal offices in New Jersey since 1977 and previously did so in New York. The company's Minerals Division, which was directly involved in the contract with Iowa Electric, is located in Denver, Colorado with its uranium mining and milling operations primarily in Moab, Utah. Atlas has no agents, employees, offices or facilities in Iowa and owns no property there. Atlas does not solicit or transact any business in Iowa, nor is it qualified to do business in that state.

Atlas did not initiate the agreement with Iowa Electric which is the subject of this lawsuit. In 1971 Iowa Electric wrote to various uranium producers requesting price quotations and offers to sell specific quantities of natural uranium ore concentrates to be supplied over a period of years. The solicitation of Atlas' bid was mailed to Atlas' offices in New York. The invitations to bid designated Pickard, Lowe & Associates, Inc., a consulting fuel management firm in Washington, D. C., to receive all responses, and Atlas mailed its bid proposal to the Pickard firm in Washington, D. C. Thereafter, the contract between Iowa Electric and Atlas was negotiated in Washington, D. C. and executed by Atlas in New York.[2]

[2] Faced with substantial unforeseen increases in production costs several years after execution of the parties' contract, Atlas sought renegotiation of the contract price provision. Unsuccessful renegotiations and delayed deliveries eventually led to this lawsuit. In

The contract called for performance by Atlas in Illinois. Atlas was to deliver shipments of uranium ore to sampling and conversion facilities in Metropolis, Illinois designated by Iowa Electric. There, as to each shipment which conformed to specifications, title passed to Iowa Electric, and Atlas had no further obligations under the contract.

II.

Iowa Electric contends that Atlas was "doing business" in Iowa within the meaning of the state's long-arm statute, Iowa Code § 617.3. Section 617.3 states in part:

> If a foreign corporation makes a contract with a resident of Iowa *to be performed in whole or in part by either party in Iowa,* * * * such acts shall be deemed to be doing business in Iowa by such foreign corporation for the purpose of service of process or original notice on such foreign corporation under this section, and, if the corporation does not have a registered agent or agents in the state of Iowa, shall be deemed to constitute the appointment of the secretary of state of the state of Iowa to be its true and lawful attorney upon whom may be served all lawful process or original notice in actions or proceedings arising from or growing out of such contract * * *.

(Emphasis added.) Iowa Electric urges that it performed payment, record-keeping, ordering and notice functions in Iowa under the contract, and that its own acts satisfy the requirement that the contract "be performed * * * in part by either party in Iowa." We consider this a close question, particularly as the state supreme court has ruled that mere payment of the contract price by an Iowa resident does not constitute "performance" in Iowa within the meaning of

the course of these negotiations, an officer of Atlas Corporation entered Iowa for one day. We do not regard this visit as a significant contact between Atlas and the forum.

Iowa Code § 617.3. *Gravelie v. TBS Pacific, Inc.*, 256 N.W. 2d 230, 232 (Iowa 1977). Nevertheless, we cannot say that as a matter of state law, Iowa Electric's additional notice, ordering and record-keeping functions were insufficient "performance" in Iowa under the long-arm statute.

III.

However, while Iowa Electric's unilateral acts in the forum may suffice to invoke the state's long-arm statute, they cannot supply the requisite minimum contacts between Atlas and the forum state so that the assertion of personal jurisdiction over Atlas would comply with traditional notions of fair play and substantial justice. *See International Shoe v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *See also Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958):

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each case that there be come act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State*, thus invoking the benefits and protections of its laws.

(Emphasis added.)

Merely entering into a contract with a forum resident does not provide the requisite contacts between a defendant and the forum state. *See Aaron Ferer & Sons Co. v. American Compressed Steel Co.*, 564 F.2d 1206, 1211 (8th Cir. 1977).[3] This is particularly true when all elements of

[3] To assess compliance with due process, with respect to jurisdiction in a particular case, the minimum contacts relied upon must be between the defendant and the forum state, not simply between the defendant and a resident of the forum state.

Aaron Ferer & Sons Co. v. *American Compressed Steel Co.*, 564 F.2d 1206, 1211 (8th Cir. 1977). In this and two related cases, *Aaron Ferer & Sons Co.* v. *Atlas Scrap Iron & Metal Co.*, 558 F.2d 450 (8th Cir. 1977) and *Aaron Ferer & Sons Co.* v. *Diversified Metals Corp.*, 564 F.2d 1211 (8th Cir. 1977), we agreed with the United States Court for the District of Nebraska that it could not assert personal jurisdiction over any of the nonresident corporate defendants who had entered into contracts with the Nebraska plaintiff. In each case, the defendants had engaged in a continuous course of dealing with the resident plaintiff for a substantial time, and negotiations involved telephone calls and mailings both originating and received in Nebraska. In addition, the plaintiff prepared payments in Nebraska drawn on a Nebraska bank, and the contracts were prepared in Nebraska, signed by the plaintiff there, mailed to the nonresident defendants for execution and returned to Nebraska. We held these contacts with the forum insufficient because the contracts were not to be performed in Nebraska, the goods did not originate there and were not to be delivered in the forum and the defendants maintained no offices, agents or salesmen in the state.

the defendant's performance are to take place outside of the forum. *Id.* at 1210. *See also Barnstone v. Congregation Am Echad*, 574 F.2d 286, 288 (5th Cir. 1978); *American Steel, Inc. v. Cascade Steel Rolling Mills, Inc.*, 425 F.Supp. 301, 303 (S.D.Tex.1975), *aff'd*, 548 F.2d 620 (5th Cir. 1977).

Iowa Electric recites several factors which the district court considered sufficient to justify the exercise of jurisdiction over Atlas.

First, the contract designated Iowa law to control interpretation of the parties' agreement. However, the Supreme Court has consistently differentiated factors which affect the choice of substantive law applicable to a controversy from those which permit a court to exercise personal jurisdiction over a nonresident. *See Hanson v. Denckla, supra*, 357 U.S. at 254, 78 S.Ct. at 1240:

> It does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most

> convenient location for litigation. *The issue is personal jurisdiction, not choice of law.* It is resolved in this case by considering the acts of the trustee.

(Emphasis added.) *See also Shaffer v. Heitner,* 433 U.S. 186, 215, 97 S.Ct. 2569, 2586, 53 L.Ed.2d 683 (1977), "we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute." *Accord, Kulko v. Superior Court of California,* 436 U.S. 84, 98, 98 S.Ct. 1690, 1700, 56 L.Ed.2d 132 (1978), "the fact that California may the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant."

Other courts have specifically rejected the designation of forum law to govern contract interpretation as a basis for long-arm jurisdiction. *See, e. g., Galgay v. Bulletin Co., Inc.,* 504 F.2d 1062, 1066 (2nd Cir. 1974):

> Appellant's final contention is without merit. The agreement here provided that the contract was to be governed and interpreted in accordance with New York law, and appellant argues that this provision makes the defendant amenable to suit in New York, It is well established that this choice-of-law provision does not have jurisdictional implications.

See also Telco Leasing, Inc. v. Marshall County Hospital, 586 F.2d 49, 51 (7th Cir. 1978); *Barnstone v. Congregation Am Echad, supra,* 574 F.2d at 289; *Southern Machine Co. v. Mohasco Industries, Inc.,* 401 F.2d 374, 382 (6th Cir. 1968); *Graham Engineering Corp. v. Kemp Products Ltd.,* 418 F.Supp. 915, 921 n. 9 (N.D.Ohio 1976).

Next, Iowa Electric relies on the district court's conclusions that the contract in this case had a "substantial connection" with Iowa and that Iowa had expressed a "strong

interest in providing a forum" for disputes of this kind. *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

In *McGee* a Texas insurance company was sued in California by the beneficiary of a life insurance policy which had been solicited and executed in California. The Texas company, after assuming the obligations of an Arizona insurance company, sent a letter to California soliciting the policyholder's reinsurance and then mailed to him a reinsurance certificate. The offer to reinsure the policyholder was therefore extended and accepted in the forum state where the policyholder resided and from which he mailed premiums until he died. The contract in the present case, on the other hand, was not solicited, negotiated or executed in Iowa. Nor was it to be performed in Iowa except for certain ministerial acts by Iowa Electric involving notice, ordering and record-keeping.

In *McGee* the Supreme Court also noted that the forum state had a manifest interest in the protection of resident insureds against nonresident insurance companies refusing to pay claims. This interest was reflected in a special jurisdictional statute which subjected "foreign corporations to suit in California on insurance contracts with residents of that State * * *." *Id.* at 221, 223, 78 S.Ct. at 200.

Iowa, on the other hand, has manifested no comparable "particularized interest in trying such cases in its courts by, *e. g.,* enacting a special jurisdictional statute." *Kulko v. California Superior Court, supra,* 436 U.S. at 98, 98 S.Ct. at 1700. Not only is there no special jurisdictional statute in Iowa expressing an interest specifically in contract disputes over fuel, but the Iowa legislature has limited use of its long-arm statute in contract actions generally to those in which the contract was to be performed, at least in part, in Iowa. Iowa Code § 617.3. Iowa is not among those states which "extend long-arm statutes jurisdiction

to the full extent of constitutional authority." *Gravelie v. TBS Pacific, Inc., supra,* 256 N.W.2d at 232.[4]

Finally, Iowa Electric contends that Atlas ships its product into the state of Iowa. We disagree. Atlas is responsible for delivering a raw material, uranium oxide (U_3O_8), in solid form ("yellowcake") to a testing facility in Illinois and four to six weeks later to a conversion plant owned by Allied Chemical Corporation in Illinois. Thereafter, the raw material undergoes physical transformations, chemical alterations, comingling with similar material from other sources, and a complex manufacturing process involving three companies in three states, from which, after approximately twelve months, a finished product, fuel bundles, ultimately emerges for shipment into Iowa.

The details of this process are as follows: Atlas delivers "yellowcake" to the Lucius Pitkin plant in Metropolis, Illinois for testing. If the material meets the specifications in the contract between Atlas and Iowa Electric, Atlas then delivers it in Iowa Electric's name to Allied Chemical Corporation in Metropolis, Illinois, where the material is designated to the Iowa Electric account at Allied's facility. At this point, Atlas has completed all of its contract obligations, and title to the yellowcake passes to Iowa Electric.[5]

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[4] Another important factor in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), was the absence of a readily available forum for "small or moderate individual claimants [who] frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof." *Id.* at 223, 78 S.Ct. at 201. Iowa Electric does not contend that it could not afford to litigate elsewhere or that Atlas would not be subject to suit in, for example, Delaware, New York, Colorado, Utah and perhaps Illinois.

[5] If the material which Atlas delivers to Illinois is defective or fails to meet specifications, this fact is discovered at the Lucius Pitkin plant. Thereafter, others in the finishing or refining process are responsible for meeting any subsequent specifications or other requirements under their separate contracts with Iowa Electric.

Atlas has no further involvement in subsequent refinement or manufacturing processes.

Pursuant to contract between Iowa Electric and Allied Chemical Corporation, the yellowcake is then comingled with ore from other sources, all of which undergoes conversion to a gas, uranium hexafloride (UF_6).

When instructed to do so by Iowa Electric, Allied ships the UF_6 gas to the gaseous diffusion plant in Oak Ridge, Tennessee operated by the United States Energy Research and Development Administration (ERDA). At this stage, pursuant to a separate contract between Iowa Electric and ERDA, the chemical composition of the UF_6 gas is altered by an enrichment process which increases the percentage of a constituent, the U-235 isotope, to a level suitable for use as nuclear fuel. The UF_6 which Allied transports to ERDA is comingled with UF_6 from other sources for the enrichment process.

Then, by a separate contract with Iowa Electric, the General Electric Company (G.E.) receives from ERDA enriched UF_6 at the G.E. nuclear fuel fabrication plant in Wilmington, North Carolina. The fabrication process consists of various functions, i. e., conversion from UF_6 gas to UO_2 powder, pelletizing, rod loading and assembly of fuel bundles. The final manufactured products, fuel bundles, are eventually shipped from North Carolina into Iowa.

The processes from conversion at Allied's facility through fuel fabrication at G.E.'s plant occur over a period of approximately twelve months. Iowa Electric schedules and directs the shipment of these products to and from the intermediary companies based on the timing of its own ultimate need for the finished product. We do not agree, in light of all of these facts, that Atlas ships its material into the state of Iowa.

Furthermore, a seller's knowledge that his product is "destined" in some form for the forum is not necessarily

sufficient contact with that state to confer jurisdiction over the seller, particuarly in the absence of any other voluntary contacts with the forum state. *See also Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 189 (5th Cir. 1978); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723, 730 (5th Cir.), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973); *Golden Belt Mfg. Co. v. Janler Plastic Mold Corp.*, 281 F.Supp. 368, 370-71 (M.D.N.C. 1967), *aff'd*, 391 F.2d 266 (4th Cir. 1968).[6]

We hold that the defendant lacked sufficient minimum contacts with the state of Iowa to support the assertion of jurisdiction over its person. We therefore reverse and remand, directing the district court to vacate its prior judgment and to enter judgment of dismissal in favor of the defendant, Atlas Corporation.

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[6] We recently held that a foreign seller, despite its reason to know that its product was ultimately bound for the United States, could not be sued in the state in which its product injured a resident (and thus in any state) because the article had been distributed by intermediaries who made the decisions concerning the product's ultimate customers and use. *See Hutson* v. *Fehr Brothers, Inc.*, 584 F.2d 833 (8th Cir. 1978) (en banc). The product in *Hutson* was in the same form when it injured the forum resident as when it had left the defendant and had not undergone the kind of transformation from raw material to finished product through intermediate companies outside of the forum as in this case.

APPENDIX B

APPENDIX B

IOWA ELECTRIC LIGHT AND POWER COMPANY, *Plaintiff*,

v.

ATLAS CORPORATION, *Defendant*.

No. C 77-16.

United States District Court,
N. D. Iowa,
Cedar Rapids Division.

Findings of Fact, Conclusions of Law
May 4, 1978.

Order Sept. 8, 1978.

Buyer of uranium yellowcake brought action for specific performance of the contract. Seller counterclaimed for contract reformation increasing the price of the yellowcake. The District Court, McManus, Chief Judge, held initially (Opinion I) that: (1) the record was insufficiently clear to permit the court to make any determination of the extent to which the increase in seller's production costs were due to factors unforeseen and beyond its control; and (2) seller failed to prove it was entitled to price adjustment under the theories of commercial impracticability or equitable adjustment. On motion to amend the court's findings of fact and conclusions of law (Opinion II) the court held that: (1) neither § 2-716 nor § 2-209 of the Uniform Commercial Code could provide relief for the seller under the facts of the case; and (2) increases in production costs of 50% to 58.4% above contract price, which were not attributable to seller's internal decisions or unknown contingencies, did not render the seller's performance commercially impracticable.

Judgment for plaintiff.

* * * * * * * * * * *

John F. Gaston, William O. Gray, Keith Stapleton, Cedar Rapids, Iowa, Joel S. Wight, William J. Franklin, Washington, D. C., for plaintiff.

George M. Newcombe, Eric N. Vitaliano, Edgar M. Masinter, Michael Corrigan, New York City, Patrick M. Roby, Ralph W. Gearhart, Gary J. Streit, Tom M. Collins, Cedar Rapids, Iowa, for defendant.

OPINION I

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

McMANUS, Chief Judge.

This matter was tried to the court January 16-17, 1978 on defendant's (Atlas') counterclaim for contract reformation increasing the per pound price of uranium concentrate (U_3O_8 or yellowcake). Post-trial briefs, arguments, proposed findings and motions having been received, the case is ready for decision.

In 1973 plaintiff (IE) and Atlas entered into a contract under which Atlas was to supply U_3O_8[1] to IE for four years. During the life of the contract a number of factors combined to force up the price of U_3O_8. The price increase significantly altered the uranium producing industry's cost structure. Long-term supply contracts entered into prior to the serious price inflation became increasingly burdensome to producers.

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[1] Uranium ore is mined from open and underground mines. Generally ore contains small traces of uranium, thus requiring mills to be built near the mines to chemically extract uranium oxide (U_3O_8, yellowcake) from the ore. In this process varying grades of ore are blended to maximize a mine's useful life. Atlas sells yellowcake to uranium users who further process the yellowcake into nuclear fuel. For a more complete background summary of the nature of the uranium supply industry, *see* Joskow, Commercial Impossibility, The Uranium Market and the Westinghouse Case 6 J. of Leg. Studies 119 (1977).

After two late deliveries of yellowcake by Atlas, IE, a public utility, anticipating future delays, on March 22, 1977 filed its complaint seeking preliminary and permanent injunctions: (1) to prevent Atlas from selling or otherwise disposing of U_3O_8 held or controlled by defendant; (2) to insure that IE be given priority to any of Atlas' U_3O_8 necessary to fulfill its contractual agreement; and (3) to order Atlas to sell and deliver the U_3O_8 to IE. The complaint recited the instability of the U_3O_8 market as a further grounds for insecurity. In fact the market price of U_3O_8 rose about sevenfold between the period just prior to contracting and 1977. IE moved to insure itself uranium at the 1973 price which had become a bargain in 1977.

On April 11, 1977, prior to the scheduled preliminary injunction hearing, Atlas counterclaimed stating that unforeseen factors had resulted in drastic cost increases and burdensome losses[2] which excused performance and warranted price adjustment. In addition, Atlas claimed that conditions in the industry and its agreement to continue to supply U_3O_8 entitled it to an equitable adjustment of the contract price.[3]

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[2] Testimony at trial and Atlas' exhibits indicate that Atlas lost $1,838,360.95 on its contract with IE in 1976 and projects losses of $4 million in fiscal years 1977-1979, not including corporate overhead, interest and profits. Tr. 95 and 149-150.

[3] Letters of intent dated January 8, 1973 (Plaintiff's Ex. 812) and February 20, 1973 (Plaintiff's Ex. 813) addressed to Edward Farley, Atlas' president and board chairman, and signed by Duane Arnold, president and board chairman of IE, laid out the details of the subsequent contract entered into October 15, 1973. The contract price per pound of U_3O_8 delivered in July of each year was:

1.	1975	$7.10
2.	1976	$7.55
3.	1977	$8.00
4.	1978	$8.45

Paragraph 2(b) of the contract stated:

For each pound of U_3O_8 delivered after July 15 in each year set forth in paragraph 2(a) above and before July 1 in the fol-

A hearing on the preliminary injunction was held in April, 1977 at which the parties stipulated that Atlas would continue to supply U_3O_8 pursuant to its contract through the year 1979 subject to such price increase, if any, as the court may determine after trial.[4] The court's order of April 18, 1977 stated:

> Upon such deliveries plaintiff shall pay to the defendant the contract price as provided in the contract between the parties, as amended, and plaintiff shall subsequently pay such further per pound amount, if any, as may be determined by this court on final trial of the merits.

After hearing the testimony, reviewing the voluminous exhibits and depositions and the law of commercial impracticability and equitable adjustment, it is determined that the existing contract continues to bind the parties. Although the court is sympathetic to the well-argued case supporting excuse and adjustment, it finds there is insufficient evidence to substantiate Atlas' bid for a judicial determination that its $17.40 cost of producing U_3O_8 is attributable to unfore-

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lowing year, the applicable price per pound set forth in paragraph 2(a) shall be increased at a rate of 0.12329 cents per day, provided that, with respect to concentrates delivered after the applicable Schedule/Delivery Date established in accordance with paragraph 1 hereof, no price increase shall be applied after such date.

On January 26, 1976 the contract was amended to reflect a price increase of $1.25 per pound in exchange for an option under which IE could purchase 250,000 additional pounds of U_3O_8 in 1980 at the market price on the scheduled delivery date. (Defendant's Ex. EE). The amendment also provided for new delivery dates for the remaining U_3O_8 covered by the 1973 contract.

[4] Under the contract, IE's sole remedy for nondelivery was to cancel the affected portion of the agreement, cover on the open market, and charge Atlas for the difference in costs. The consent order modified the contract to the extent that the right to demand cover was waived by Atlas.

seen and uncontrollable factors relating to market phenomena, governmental action and general inflation.

There is sufficient evidence in the record, offered by both parties, that certain production decisions were made in response to rising market prices for U_3O_8 and resulted in higher costs of production. The decision to develop the acid circuit for extracting U_3O_8 and vanadium was made prior to the 1973 contract. (Farley Tr. 114). In 1972, prior to final negotiation of this contract, Atlas was aware its alkaline ore reserves were nearly exhausted. (Dearth Tr. 56). The costs of the acid circuit were somewhat higher than those of the alkaline circuit (Dearth Tr. 66) though Mr. Farley testified that he was not sure that the final per pound costs of extracting uranium from acid ore were greater. (Tr. 115-116). In fact, the June, 1977 summary of treatment costs at Atlas' Moab, Utah mill indicate that acid circuit treatment costs were substantially greater per pound of U_3O_8 (about 25 per cent) than for the alkaline circuit. (Plaintiff's Ex. 95).

In addition, as market prices rose rapidly to unexpected highs,[5] it became economically feasible and prudent for producers to use lower grade ores to fulfill new contracts made at the new increased market price. The new market prices more than made up for the increased production costs stemming from treatment of ore blends with lower uranium concentrations. The metallurgical reports from the Moab mill indicate significant lowering of ore grade blends used in the alkaline circuit between June, 1973 and June, 1977.

There is no doubt that Atlas suffered burdensome increases in production costs. There is no doubt that many of those costs were not foreseen or considered likely to occur or to be so substantial. But Atlas has failed to bear

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[5] The market price for yellowcake in 1978 rose to slightly more than $43.00. (Tr. 83).

its burden on the counter-claim to prove which and how much of the increases were reasonably unforeseen and not, in part, a function of its own actions.[6] A contract is not a sacred document. But the stability and efficiency of economic life is said to be closely linked to the integrity of these commercial agreements.

"Impracticable" as used in UCC § 2-615 does not mean impossible and each situation should be viewed in the context of reasonable commercial relationships. *See Nora Springs Cooperative Co. v. Brandau,* 247 N.W.2d 744, 747-748 (Iowa 1976); *Henszey,* UCC Section 2-615—Does "Impracticable" Mean Impossible?, 10 UCCLJ 107 (1977). However, Atlas must show that the increase is more than onerous or expensive and that it had no part in stimulating that increase. *Eastern Air Lines, Inc. v. Gulf Oil Corporation,* 415 F.Supp. 429, 438 (S.D.Fla.1975). The burden of proving each element of impracticability is on the party claiming excuse. Id.; *Cf. Ocean Air Tradeways, Inc. v. Arkay Realty Corp.,* 480 F.2d 1112, 1117 (9th Cir. 1973). Here Atlas has failed that proof.

Rostermundt's Testimony and Evidence

The record is inconclusive as to the impacts of internal corporate and external inflationary stimuli on U_3O_8 production costs. For example, in a letter addressed to Duane Arnold on January 15, 1976, Edward Farley, noting a

[6] The promiser is not discharged from his contractual duty if he himself wilfully brought about the occurrence which he claims prevents performance. 6 Corbin on Contracts § 1329 (1964). Corbin would distinguish between the burden of proof and the burden of going forward with evidence. 6 Corbin on Contracts § 1329 (1964). Regardless which approach is applied here, Atlas has failed to prove its case. Under a burden of proof theory it has failed in its burden to prove its own actions did not cause the increased costs or any part of them. Under a burden of going forward, once evidence was offered that Atlas' actions resulted in higher costs, Atlas failed to rebut or quantify those costs.

change in ore grades, stated that this "lower grade translates into a 39% direct cost increase".

Iowa Electric's expert witness, Leo Rostermundt, testified that he believed internal decisions accounted for at least 25 per cent of Atlas' total production cost and about half of the total increased costs claimed by Atlas. Though the court will admit Rostermundt's testimony and IE's exhibits 934 and 934-1, objected to at trial and subject to a motion to strike, it gives them little weight. The actual calculations seem too speculative to serve as a basis for this decision. In fact, in his deposition taken November 21, 1977, Mr. Rostermundt stated that in order to calculate the cost per pound of U_3O_8 he would have to know "all the things [he] needed to know to do an audit. . . ." (Dep. 89). He offered the same answer when asked "If you were just to satisfy yourself personally that you could calculate the cost per pound of U_3O_8, what would you need to have?" Neither he nor his firm had performed an audit on Atlas. He based his calculations on corporate records and the audit of Atlas' independent auditor, Cooper & Lybrand.

Mr. Rostermundt's testimony as to certain accounting principles aided the court generally in understanding production costs in the uranium industry. "Doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions". 3 Weinstein's Evidence ¶ 702[01], at 702-9 (1976). No such factors exist here.

Iowa Code § 554.2615

In relevant part IC § 554.2615 (hereafter referred to as § 2-615) adopts the following language from the 1962 Official Text of the Uniform Commercial Code (UCC):

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

It is noted that the official comments stress that the test of "commercial inpracticability" must be distinguished from the common law tests of "impossibility" and "frustration of performance" in order to call attention to the commercial character of the article. Official Comments 1-3.[7]

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[7] Judge Skelly Wright emphasized the difference between commercial impracticability and physical impossibility in *Transatlantic Financing Corporation* v. *United States,* 124 U.S.App. D.C. 183, 186, 363 F.2d 312, 315 (1966) when he wrote:

> The doctrine ultimately represents the evershifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.

The doctrine of impracticability has been narrowly construed. Although proponents of liberal interpretations point to *Mineral Park Land Co.* v. *Howard,* 172 Cal. 289, 156 P. 458, 460 (1916) for the proposition that excessive and unreasonable cost can excuse performance, few courts have excused performance on that theory alone. *See Transatlantic Financing Corporation* v. *United States, supra* n.14 and text at 190 of 124 U.S.App.D.C., at 319 of 363 F.2d.

However the magnitude and impact of drastic cost increases in the modern commercial context may call for a liberalization of the way courts read § 2-615 where performance makes little commercial sense and there is adequate proof of actual costs brought about by the unforeseen contingency.

Three elements must be proven before excuse becomes available under § 2-615: (1) the seller must not have assumed the risk of some unknown contingency; (2) the non-occurrence of the contingency must have been a basic assumption underlying the contract; and (3) the occurrence of that contingency must have made performance commercially impracticable.

The contract between the parties does not specifically allocate the risk of the occurrence of the types of unforeseen contingencies which Atlas claims in the aggregate make this contract impracticable. It does make Atlas liable for costs due to delivery of uranium which does not meet contract specifications. Atlas also accepts title and risk of loss until delivered to IE's conversion plant. Paragraph 7 of the contract provides for cover with Atlas liable for the difference between cover price and contract price and any penalties imposed on IE by the conversion plant operator for failure or delay in delivery. Excuse is granted under paragraph 8 for the occurrence of a "force majeure".

Where the risk of substantially increased costs is not allocated by the contract, § 2-615 comes into play and the court looks to the foreseeability of the conditions claimed as a basis for excuse and the nature of the burden to determine if the occurrence or occurrences make performance commercially impracticable. *See Mishara Construction Co., Inc., v. Transit-Mixed Concrete Corp.,* 365 Mass. 122, 310 N.E.2d 363 (1974).

Foreseeability

In *Nora Springs, supra,* the Iowa Supreme Court noted that excuse may be available where "increased cost is due to some unforeseen contingency which alters the performance". 247 N.W.2d at 748, *citing Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.,* 508 F.2d 283, 293-294 (7th Cir. 1974). Before reaching the question of impracticability

then, the court must consider whether the non-occurrence of contingencies complained of were at the heart of the contract, that is, were they foreseeable.

Atlas claims that the Arab oil embargo and OPEC cartel, unexpected federal environmental and occupational safety regulations, inordinate inflation of wages and chemical and equipment costs, and certain uranium market conditions (mainly the announcement that Westinghouse could not fulfill its contractual commitments to supply about 70 million pounds of yellowcake) combined to make performing the IE contract commercially impracticable. While some of these phenomena may have been unforseen, and certainly the total impact was not contemplated by either party during contract negotiations, the evidence in this case shows that prior to the contract being signed there was good reason to anticipate rising costs and drastically increased expenditures for environmental and safety equipment and procedures. *See* Plaintiff's Exhibits 303, 324 (37 Fed. Register No. 13). During the days when uranium producers were hanging on in a buyer's market there were signs that eventually yellowcake production would become profitable, not because of lower production costs, but due to increased demand and prices. (Plaintiff's Exhibit 393 (Wall Street Journal, Nov. 14, 1972)). *See Joskow,* Commercial Impossibility. The Uranium Market and the Westington Case, 6 J. of Leg. Studies 119, 136-137 n. 16 and text (1977).

It would be unfair to expect Atlas to have prophesied the magnitude of the increases complained of, but it is not clear that it was not in a position to protect itself contractually from some of the risks which would drive the price of yellowcake up and consequently affect the cost of production.

Testimony at trial also indicates that Atlas needed a long-term supply contract to strengthen its position in obtaining corporate financing. Thus, it entered into the IE

contract with hopes of marginal profits but warnings that it might lose money. (Plaintiff's Exhibit 425).

Impracticability

Where the occurrences complained of are in some degree foreseeable and capable of being protected against contractually, where the burdensome production cost increase complained of is to some extent a function of internal corporate decisions, and where it is impossible to determine what share of the increase is attributable to unforeseen conditions not assignable to the party seeking discharge or adjustment, it becomes unnecessary to reach the question of how much increase constitutes impracticability. In fact failure of proof stymies any attempt this court could make toward adjustment under § 2-615.

Equitable Adjustment—IC § 554.2716(2)[8]

IE sought and obtained specific performance from this court which ordered Atlas to continue delivering U_3O_8 under the contract. Atlas correctly notes that IC § 554.2716 (§ 2-716) liberalizes the common law concept of specific performance, and the language of the section and nature of the consent order would allow this court to equitably adjust the price of the disputed U_3O_8. The problem facing the court is determining an equitable price for the U_3O_8. As discussed above, Atlas has failed to establish the amount of increase in the cost of producing U_3O_8 caused by factors beyond its control and pre-contract contemplation. Absent sufficient proof of an amount which would institute an

[8] IC § 554.2716 (1965) states the buyer's rights to specific performance and implies that specific performance may be accompanied by price adjustment. In relevant part it states:

> (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
>
> (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

equitable adjustment, this court cannot pick a price out of the air. The $17.40 price Atlas seeks is partially a function of Atlas' internal, profit-maximizing decisionmaking process. As such it cannot be the basis for this court to reform the contract's price element.

Equitable Adjustment—IC § 554.2209 [9]

As noted above in the discussion of § 2-716, equity may require some adjustment of price. Section 554.2209 (§ 2-209) of the Iowa Code provides for modification of contract. Official Comment 2 states in relevant part:

> The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" Section 2-103), and may in some situations require an objectively demonstrable reason for seeking modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Section 2-615 and 2-616.

[9] In relevant part IC § 554.2209 (1965) provides for modification, rescission and waiver in the following terms:

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) . . .

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

This comment might support a more liberal modification theory than does § 2-615. But again, Atlas fails in its proof of what constitutes an equitable adjustment. There is no doubt that the parties have entered into the modification included in the consent order in good faith (at least the good faith of horse traders), however the court cannot on this record develop a reasonable adjusted price.

Summary

This is a difficult case. A number of factors have coalesced to turn to what might have been perceived as a profitable deal into a disaster. Not adjusting the price here should not be read as barring recovery under any of the theories pressed by Atlas where the proof is sufficient to allow judicial intervention. The court takes note of the number of voluntary price adjustments entered into by other suppliers and buyers of yellowcake. Voluntary attempts at reaching equitable agreements and foregoing expensive litigation should be encouraged.

For purposes of analyzing this case under any of the espoused theories, the contract should normally stand alone, i. e. corporate financial condition should be irrelevant. However, the relationship of this contract with more recent ones entered into by Atlas at higher market prices leads the court to the conclusion that disaster was at least partly attributable to the type of prudent business decisions which point to substantial long-term profits for Atlas Corporation's Minerals Division. *See* Defendant's Exhibit MF.

Findings of Fact

1. IE is a corporation organized and existing under the laws of the State of Iowa with its principal place of business in Cedar Rapids, Iowa and is engaged as a public utility in supplying electricity to consumers.

2. Atlas is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Princeton, New Jersey and through its Minerals Division, is engaged in the production and sale of uranium concentrate (U_3O_8, yellowcake).

3. Atlas, from 1968 until 1975 processed only uranium ore in an alkaline circuit.

4. Prior to 1973 Atlas knew its reserves of alkaline ores were rapidly becoming exhausted.

5. In 1972 and 1973 Atlas discovered and purchased significant reserves of uranium-vanadium ores in areas near its Moab, Utah mill.

6. Prior to 1972 Atlas had planned to rebuild an acid circuit to process uranium-vanadium ores.

7. For several years prior to 1972, the price of uranium was artificially low and capital for expansion was in short supply.

8. Atlas, confident that the uranium market would expand, entered into negotiations with IE to supply yellowcake for the years 1975 through 1978 and a contract was signed October 15, 1973.

9. The contract contained a constant escalation factor of 3¾ cents ($0.0375) per pound per month to cover inflation and costs of environmental and safety requirements. The contract provided for shipment of approximately 700,000 pounds of yellowcake at a base price of $7.10 per pound escalating to $8.45 per pound in 1978.

10. Atlas officials believed they would realize profits from the contract, but were informed by their accountants that a contract similar to that negotiated with Iowa Electric might incur losses.

11. Relying partially on the contract, Atlas obtained substantial financing to expand and renovate its uranium operations.

12. Pushed by a number of factors, the price of yellowcake increased from $5.95 to $43.00 per pound between 1972 and 1977.

13. Some of these factors were foreseeable by Atlas. The rapidly rising price had the effect of spurring competitive bidding for ores, driving that price up, and allowed producers to mill lower grades of ore, extending the life of the ore supplies. Treatment of lower grade ores increased the per pound cost of production of yellowcake. Thus, at least some of the production cost increase is attributable to Atlas' own actions in responding to market forces.

14. As production costs rose beyond the price levels in Atlas' 1973 contract, Atlas notified IE of the problem and requested an adjustment. Some of the correspondence between Atlas and IE was informational, requiring no response though business etiquette may have dictated otherwise.

15. An amendment to the 1973 contract was signed on January 26, 1976 increasing the price of yellowcake by $1.25 per pound and changing the scheduled delivery dates to extend into 1979. IE received an option to purchase an additional 250,000 pounds of uranium in 1980 at the then market price.

16. Subsequent communications by Atlas requesting new adjustments repeatedly met with silence.

17. Post amendment deliveries in 1976 were repeatedly late.

18. Acknowledgements to communications from IE to Atlas concerning late deliveries were late and unresponsive.

19. Negotiations regarding delivery and price adjustment faltered in early 1977 and this suit was commenced March 22, 1977.

20. Both parties have attempted to maximize their business positions by hard-headed, but good faith bargaining.

21. Atlas, though a profitable corporation, sustained losses on this contract.

Conclusions of Law

1. This court has jurisdiction of the parties, and subject matter.

2. Atlas has failed to prove by a preponderance of the evidence that it is entitled to equitable contract reformation increasing the price of yellowcake supplied IE above that specified in the contract as amended.[10]

IT IS ADJUDGED.

Atlas' counterclaim dismissed.

OPINION II

This matter is before the court on defendant's resisted motions to alter or amend this court's May 4, 1978 findings of fact and judgment under FRCP 52(b) and 60(b) and in the alternative to reopen the record for clarification and for new evidence under FRCP 59(a). The court finds that it is not necessary to reopen the record but that defendant's motion to alter and amend should be granted. However, the judgment for plaintiff must stand.

This case was tried to the court January 16-17, 1978. On May 4, 1978 decision was rendered in favor of plaintiff, Iowa Electric Light and Power Company (IE) on defendant Atlas Corporation's (Atlas') counterclaim, denying defendant an upward adjudgment of its contractual selling price under three theories embodied in separate sections of Iowa's Uniform Commercial Code—§§ 554.2615, 554.2716(2) and 554.2209, (§§ 2 615, 2 716, 2 209). Basically the court held that defendant failed to prove by a preponderance of the evidence the critical element in determining any equitable adjustment—that increased costs of production were not attributable to its own profit-maximizing decisions or contingencies which it could have foreseen and protected against.

[10] It has failed to prove that the increases resulted from actions beyond its control and that the contingencies which occurred were not foreseeable at the time of contracting. Both elements are required for relief under § 2-615. Neither is equitable adjustment under § 2-209 or § 2-716 available where the party seeking to be excused does not establish the amount of claimed production cost increases caused by events beyond its control.

Now defendant moves for reconsideration of the voluminous record and has reorganized its exhibits to comply with the court's standard of proof. Fairness demands reconsideration in light of the substantial legal and equitable issues involved. Now that defendant presents a clearer picture of its cost structure, it is possible to consider whether defendant carries its burden to prove commercial impracticability.[1]

[1] IC 554.2615 provides in relevant part:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) *is not a breach* of his duty under a contract for sale *if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made* or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (emphasis added).

The court has already found that at least part of defendant's contractual losses resulted from the occurrence of a contingency whose nonoccurrence was an underlying assumption of the contract and which was not contemplated by the parties, the risk of which was not allocated among the parties. *See also Eastern Air Lines, Inc.* v. *Gulf Oil Corp.*, 415 F.Supp. 429, 438 (S.D.Fla. 1975).

Defendant has reorganized certain evidence taken at trial of this case in an attempt to satisfy its burden to show that continued performance of its contract with IE is "commercially impracticable" under § 2-615 as a result of unforeseen events to which Atlas did not contribute. Defendant also would have the court apply §§ 2-716 and 2-209 to the facts and equitably adjust the contract price of U_3O_8 (yellowcake) sold IE.

§§ 2-716 and 2-209

Defendant argues that the court's May 4, 1978 holding favors adjustment under these sections of the Iowa Uniform Commercial Code. That inference was mistakenly supported by language in the original decision. The court takes this opportunity to clarify its position.

Initially it is noted that specific performance under § 2-716 is a buyer's remedy. Defendant points to paragraph 2 to support its theory that a court may adjust the price in favor of seller to balance the equities of specific performance. That section has never been so construed. Nor does its language lend itself to that interpretation. Section 2-716(2) states:

> The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

The language appears to deal with terms of payment, i. e., time, place, manner, not with judicial adjustment of the actual contractual price term. In fact Official Comment 4 of the Uniform Commercial Code states:

> This section is intended to give the buyer rights to the goods comparable to the seller's rights to the price.

This court will not adjust price based on this section.

Similarly defendant asserts that § 2-209 provides a basis for adjustment. It does not. Defendant argues that by entering into a consent decree with plaintiff under which it would continue to perform its contractual obligations, it modified the contract by waiving its right to cease performance and forcing IE to cover—the only remedy provided in the contract. The consent decree provided for voluntary performance subject to the court's ultimate determination of the amount to be paid by plaintiff to defendant. The consent order however did not give defendant a right to price adjustment, particularly not under § 2-209. That section contemplates modification emanating from "good faith" bargaining between merchants. § 2-209, Comment 2. It does not undertake to give the court a role in imposing an adjustment. As plaintiff states, it sets standards for a court to determine whether a voluntary waiver of a contract provision is enforceable and whether that waiver is reasonably withdrawn. *See* Anderson's Uniform Commercial Code § 2-209; *Double-E Sportswear Corp. v. Girard Trust Bank,* 488 F.2d 292 (3d Cir. 1973); *Nora Spring Co-op Co. v. Brandau,* 247 N.W.2d 744, 749 (Iowa 1976). No court-imposed adjustment is available under this section.

In its order of May 4, 1978 the court mistakenly indicated equitable adjustment was possible under § 2-716. That statement is amended by this order. The court did not specifically consider the merits of defendant's § 2-209 claim but held only that the proof of what constituted an equitable price was insufficient. This order constitutes the court's holding as to the applicability of §§ 2-716 and 2-209.

The above discussion makes it clear that if defendant is to prevail, it must carry the burden on its § 2-615 claims.

Commercial Impracticability

As noted above, the court's May 4, 1978 decision was grounded on defendant's failure to prove the amount of cost increase above the contract price attributable to un-

foreseen sources and not to defendant's own business decisions. Now defendant has come forward with a request that the court review the already admitted evidence in an attempt to compute an equitable cost.

Three elements must be proven before excuse or adjustment becomes available under § 2-615: (1) the seller must not have assumed the risk of some unknown contingency; (2) the nonoccurrence of the contingency must have been a basic assumption underlying the contract; and (3) the occurrence of that contingency must have made performance commercially impracticable. It has already been determined that the risk was not contractually allocated. *See* Opinion I *supra*. The court must now reconsider element 2 and if satisfied that the proof is sufficient as to non-foreseeable factors and not attributable to defendant's actions, it will then consider the question of impracticability, excuse and adjustment.

Time Period

Defendant argues that costs should be computed for the life of the contract as amended on January 26, 1976. The original contract called for deliveries in 1975-1978. The amendment deferred deliveries into 1979. Plaintiff complains that defendant should not benefit from cost increases after 1978 since it knew at the time of amendment that its cost increases were "substantial". (Tr. 86). The court agrees that deferral should not benefit defendant. Any adjustment must be based on cost increases incurred during the 1976-1978 period. Under the amended contract nine deliveries totalling 568,750 pounds of U_3O_8 were scheduled for that period at an average cost per pound of $9.0036 for a total cost to IE of $5,120,766.66. Any determination of impracticability and adjustment must be based on these figures.[2]

[2] Even if the court computed Atlas' losses on the basis of the amended contract, the loss would not constitute commercial im-

Defendant now offers an analytical structure for determining its costs which were not foreseeable or a function of its own actions. It has adjusted for decreased ore grade and environmental expenditures using dates and figures most favorable to plaintiff and has arrived at a new cost figure of $14.27 per pound of U_3O_8. This cost represents a 58.4 percent increase over the contract price and loss over the contractual period of approximately $3,097,312.00.

Plaintiff criticizes these figures for failing to include adjustments for: (1) depreciation due to ore grade reduction, (2) ore grade decline during the entire contractual period, and (3) exploration and general administration costs. Plaintiff's computation of adjusted cost is $13.44 per pound of U_3O_8, or an increase of approximately 50 percent over contract. Using these figures defendant's net loss for the original contractual period is about $2,525,250.00.

The court's computation of adjusted costs includes additional depreciation due to reduced ore grade ($.31 per pound of U_3O_8) and ore grade differential for the full contractual period ($.26 per pound of U_3O_8) and rejects additional general costs and those for exploration and administration which cannot be firmly attributed to defendant's decision to reduce ore grade. Cost then is $13.70 per pound of U_3O_8 for an increase over contract of 52.2 percent and a loss of about $2,673,125.00.

Using any of these figures, Atlas is not entitled to discharge or adjustment under § 2-615. The absolute losses and percentage of increase do not warrant so drastic a remedy for a bad deal. This is especially so in the present instance because Atlas was in the best position to protect itself from the vagaries of the marketplace and is obviously

practicability. Assuming Atlas' cost to be $14.27 per pound of U_3O_8 (the cost most favorable to defendant), the loss on the contract for the full 728,750 pounds would be about $3,672,900.00, less than 55 percent.

at least as able to bear the risk as IE. In fact, Atlas has successfully spread the risk of its losses through highly profitable contracts subsequent to the one at issue. In *Transatlantic Financing Corporation v. United States,* 124 U.S.App.D.C. 183, 363 F.2d 312 (1966) the court refused to excuse the shipper from performing its contract to transport wheat from a United States Gulf port to a safe port in Iran after the Egyptians closed the Suez Canal during an armed international crisis in late 1956. Judge Wright stated:

> Transatlantic was no less able than the United States to purchase insurance to cover the contingency's occurrence. If anything, it is more reasonable to expect owner-operators of vessels to insure against the hazards of war. They are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required), and are undoubtedly sensitive to international trouble which uniquely affect the demand for and cost of their services.

363 F.2d at 319.

While rampant inflation may not have been as foreseeable as war in the Middle East, Atlas was in a better position to measure its impact on the uranium industry. Although the increased cost of production seriously altered Atlas' expectations with respect to the contract at bar, by taking advantage of the inflated market prices and profit margins in new contracts, it effectively spread its risk among other buyers.

In addition, increases of 50-58 percent generally have not been recognized as a basis for excusing or adjusting contractual obligations. *See e. g., Ocean Transp. Tankers Corp. v. V/O Sovfracht (The Eugenia),* [1964] 2 Q. B. 226, 233; *Tsakiroglou & Co., Ltd. v. Noblee Thorl G.m.b.H* [1960] 2 Q. B. 348 Note 4; *Schafer v. Sunset Packing Co.,*

474 P.2d 529, 530 (Or. 1970); § 2-615 Official Comment 4. These British precedents have been cited favorably and followed in *Transatlantic Financing Corp., supra,* and *Eastern Air Lines, Inc. v. Gulf Oil Corp.,* 415 F.Supp. 429 (S.D.Fla. 1975). The mere fact that performance has become economically onerous is not sufficient to excuse performance. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.,* 508 F.2d 283, 293 (7th Cir. 1974); *United States v. Wegematic Corp.,* 360 F.2d 674, 677 (2d Cir. 1966).

Cost of Acid and Alkaline Circuits

Defendant asserts that the court's May 4, 1978 finding that acid circuit treatment costs per pound of U_3O_8 were higher than alkaline circuit costs is erroneous. Its exhibit, set out in Appendix B, would support that assertion. However, other cost summaries found in plaintiff's trial exhibits 94 and 95 indicate that the acid circuit treatment costs were higher. Therefore the original finding is clearly not erroneous and will stand. At any rate, the finding, even if erroneous, is not determinative of any critical element in this case, and though relevant, was not necessary to the court's holding. *See American Ins. Co. v. Lucas,* 38 F.Supp. 926, 939-956 (W.D.Mo. 1941) *appeals dismissed* 314 U.S. 575, 62 S.Ct. 107, 86 L.Ed. 466, *cert. denied* 317 U.S. 712, 63 S.Ct. 433, 87 L.Ed. 567; *cf. Vennell v. United States,* 38 F.Supp. 381, 382 (E.D.Pa. 1941), *affirmed* 122 F.2d 936 (3d Cir. 1941).

This order constitutes additional and amended findings of fact and conclusions of law which together with the May 4, 1978 order, findings and conclusions, constitute the final judgment of this court.

It is therefore

ORDERED

1. Judgment amended and supplemented consistent herewith.

2. Counterclaim dismissed.

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. C 77-16

IOWA ELECTRIC LIGHT AND POWER COMPANY, *Plaintiff*,

v.

ATLAS CORPORATION, *Defendant*.

This matter is before the court on defendant's resisted motion to dismiss for lack of jurisdiction over the person, filed March 31, 1977, supplemented April 4, 1977.

Defendant Delaware corporation contracted with plaintiff to supply nuclear fuel components for plaintiff's Palo, Iowa nuclear energy plant. Plaintiff alleges defendant has failed to supply. Defendant claims to have had no minimum contacts with Iowa. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945).

Defendant's contacts with Iowa are indistinguishable from those held sufficient in *Midland Forge, Inc.* v. *Letts Industries,* 395 F.Supp. 506 (N.D. Iowa 1975). Moreover, this action is based on a contract which has substantial connection with Iowa. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957); *Midwest Packaging Corp* v. *Oerlikon Plastics, Ltd.,* 279 F.Supp. 816 (S.D. Iowa 1968).

Cases cited by defendant do not support defendant's position.[1] Unlike *Hanson* v. *Denkcla*[sic], 357 U.S. 235 (1958), there is nothing unilateral about plaintiff's activity with

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[1] In *Ratliff* v. *Cooper Laboratories, Inc.,* 444 F.2d 745, (4th Cir. 1971) plaintiff non-resident's injury did not arise out of defendant's forum contacts. In *McCalla* v. *A. J. Industries, Inc.,* 352 F. Supp. 544 (E.D.Wisc. 1973) the due process issue was not reached. *E. Film Corp.* v. *United Feature Syndicate, Inc.,* 172 F.Supp.

defendant. Defendant is a foreign corporation which has physically come to Iowa concerning this matter, purposely availed itself of the protection of Iowa law by signing a contract specifically stating Iowa law controls, and whose products here in dispute physically enter Iowa as per the contract.

The quantity of defendant's contacts consist of one personal meeting in Iowa and numerous shipments of nuclear fuel components. The quality of those contacts are the core of plaintiff's business operation and this cause of action arises directly out of those contacts. Iowa has a strong interest in providing a forum for fuel supply contract disputes affecting a major energy source and defendant does not claim to be inconvenienced by this forum. *see generally, Caesar's World, Inc.* v. *Spencer Foods, Inc.*, 498 F.2d 1176 (8th Cir. 1974).

Considering defendant's contacts with Iowa and the fact that this cause of action arises out of those contacts, the court finds that it would not offend traditional notions of fair play and substantial justice to subject defendant to this court's personal jurisdiction.

It is therefore

ORDERED

Denied.

April 7, 1977.

/s/ EDWARD J. MCMANUS
Edward J. McManus,
Chief Judge
United States District Court

(N.D.Ill. 1958) dealt with the Illinois long arm statute. ***Erlanger Mills*** v. ***Cohoes Fibre Mills,*** 239 F.2d 502 (4th Cir. 1956) was decided prior to ***McGee, supra*** and defendant does not claim this court's present exercise of personal jurisdiction burdens interstate commerce.

APPENDIX D

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH DISTRICT

September Term, 1978

No. 78-1759

IOWA ELECTRIC LIGHT AND POWER COMPANY, *Appellee,*

v.

ATLAS CORPORATION, *Appellant.*

Filed August 22, 1979.

APPEAL FROM the United States District Court for the Northern District of Iowa.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Northern District of Iowa and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

Costs taxed in favor of Appellant:	**August 22, 1979**
Clerk's docketing fee	**$ 50.00**
Costs of printing 10 copies of brief:	**$ 678.10**
Costs of printing 10 copies of reply brief:	**$ 362.20**
Total costs of Appellant for recovery from Appellee in the U. S. District Court:	**$1,090.30**

Order entered in accordance with opinion:

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals,
8th Circuit.